Supreme Court, U.S.
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No. 87-349

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1987

NORTHROP CORPORATION,
Petitioner,

v.

TRIAD INTERNATIONAL MARKETING, S.A.,
and TRIAD FINANCIAL ESTABLISHMENT,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTION PRESENTED

Whether an American court or arbitration tribunal is required to decline to enforce an international contract which is governed by and valid under American law merely because the contract is or may be unenforceable under the law of a foreign country, when the obligation sought to be enforced is not to be performed in the foreign country.

PARTIES TO THE PROCEEDING

Pursuant to Rule 28.1, respondent Triad International Marketing, S.A., states that it is a wholly-owned subsidiary of Triad Holding Corporation.*

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*A Khashoggi family trust was established in 1979 ("the Trust"). The Trust owns the stock of Triad International Corporation, which owns the stock of Triad America Corporation. Triad America Corporation has a number of wholly-owned subsidiaries and a few non-wholly owned subsidiaries, the corporate names of virtually all of which include the word "Triad". Respondents do not understand any of the entities referred to in this footnote to be an "affiliate" of Triad International Marketing, S.A. or Triad Financial Establishment within the meaning of Rule 28.1.

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BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Respondents, Triad International Marketing, S.A. and Triad Financial Establishment (hereinafter collectively "Triad"), oppose the petition of Northrop Corporation ("Northrop") to this Court to issue a writ of certiorari to review a decision of the Ninth Circuit Court of Appeals issued March 3, 1987. That decision reversed a judgment of the District Court that vacated in substantial part an arbitration award which adjudged Northrop liable to respondents for commissions due under a Marketing Agreement breached by Northrop in 1975. The Ninth Circuit's reversal was based on the District Court's failure to accord the arbitration award the deference required by §9 of the Federal Arbitration Act, 9 U.S.C. §1 *et seq.*, Appendix, p. A-1, and controlling decisions of this Court and the Court of Appeals.

The petition should be denied because the "question presented for review" by Northrop was not raised before the arbitrators or the District Court and was not timely raised before the Court of Appeals.[1] The question is therefore not properly before this Court. *Oneida County, N.Y. v. Oneida Indian Nation*, 470 U.S. 226 (1985); *F.T.C. v. Grolier Inc.*, 462 U.S. 19, 23, n.6 (1983); *Rogers v. Lodge*, 458 U.S. 613, 628, n. 10 (1982), *reh'g denied*, 459 U.S. 899 (1982); *G. D. Searle & Co. v. Cohen*, 455 U.S. 404, 412 n.7 (1982); *Delta Airlines, Inc. v. August*, 450 U.S. 346, 362 (1981); *Adickes v. S. H. Kress & Co.*, 398 U.S. 144, 147, n.2 (1970).

In addition, there is no basis for issuing a writ of certiorari in this case in light of the considerations governing review on certiorari. S.Ct. R.17. The case involves a dispute pertaining to a commercial contract that was

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[1]The question was first raised in the Court of Appeals in Northrop's petition for rehearing. A court of appeals will not consider an issue raised for the first time in such a petition. *Holley v. Seminole County School Dist.*, 763 F.2d 399, 400-01 (11th Cir. 1985); *Wells v. Rushing*, 760 F.2d 660, 661 (5th Cir. 1985); *Bullock v. Mumford*, 509 F.2d 384, 388-89 (D.C. Cir. 1974); *Partenweederei MS Belgrano v. Weigel*, 313 F.2d 423, 425 (9th Cir. 1962), *cert. denied*, 371 U.S. 830 (1962), *reh'g denied*, 371 U.S. 906 (1962).

Northrop asserts that the Court of Appeals "ruled that a federal court violates no public policy when it orders a party to commit an act illegal under foreign law," petition at 10, thus implying that the "question for review" as set forth in its petition was presented to the Court of Appeals and decided in its Opinion issued on March 3, 1987. This is simply not true. The question presented in the petition for certiorari and the cases upon which Northrop now relies, petition at 10-14, were first presented to the Court of Appeals at pages 16-21 of Northrop's petition for rehearing. As Northrop acknowledges, its fundamental defense in the proceedings below was that *California* law made the Marketing Agreement unenforceable. Petition for certiorari at 4.

submitted to arbitration and decided in favor of Triad under California law, the law specified in the contract. The District Court declined to enforce the arbitration award because it believed the arbitrators had misinterpreted the applicable California law. The Court of Appeals reversed on the ground that the District Court had failed to apply the deferential standard of review required in arbitration cases. Numerous issues of fact and law were contested between the parties in the arbitration proceeding, the District Court, and the Court of Appeals. Some were decided in favor of each party. Whether the many rulings made in those eight years of litigation may have been right or wrong does not warrant review by this Court.

Tacitly recognizing that the matters decided below do not merit review on certiorari, Northrop seeks by its petition to present an issue neither timely raised nor addressed below, in an effort to create a "question for review" that might pique this Court's interest. That attempt should be as unavailing as it is transparent.

Additional reasons why the writ should be denied are discussed at pages 11-24, *infra.*

STATEMENT OF FACTS

1. The Facts Giving Rise to Triad's Claims Against Northrop

The Triad-Northrop Marketing Agreement and The Saudi Arabian Peace Hawk Program. In the early 1970's Northrop, desiring to sell F-5 fighter aircraft and supporting services to Saudi Arabia, appointed Triad as its marketing representative for that country. The parties entered into a Marketing Agreement in October 1970 ("the Marketing Agreement"). Pursuant thereto, Triad

and Northrop engaged upon a cooperative effort to enable Northrop to make FMS sales of F-5 fighter aircraft and support services to the Government of Saudi Arabia.[2] This effort was remarkably successful, leading to the development of what became known as the Saudi Arabian Peace Hawk Program. As reflected in the contracts between DOD and the Government of Saudi Arabia, Northrop's sales to Saudi Arabia totalled $4.2 *billion* under Phases I through VII of the Peace Hawk Program. Triad was entitled to commissions on these sales from Northrop, payable to Triad in Switzerland.

Triad played a vital role in Northrop's success in Saudi Arabia. On several occasions Northrop representatives wrote to DOD officials, describing in laudatory terms the many and diverse services rendered by Triad for the benefit of Northrop, the U.S. Government, and the Saudi Arabian Government. Northrop acknowledged that if Triad had not been retained, the U.S. Government and Northrop would not have made FMS sales to Saudi Arabia.

Saudi Arabian Decree 1275 and Northrop's Repudiation of its Obligations to Triad. On or about September 17, 1975, the Saudi Arabian Council of Ministers issued a Decision ("Saudi Decree 1275") which provided

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[2]During the period relevant to this action, Northrop and other U.S. companies sold armaments and related services to foreign countries through the U.S. Government, pursuant to the Foreign Military Sales Act, now entitled the Arms Export Control Act. 22 U.S.C. §2751 *et seq.* ("FMS sales"). In such cases, the U.S. Department of Defense ("DOD") contracts to sell a product or service to the foreign country pursuant to a Letter of Offer and Acceptance ("LOA") entered into by the two governments. DOD then enters into a second contract, with an American manufacturer or supplier, to purchase the product or service for delivery to the foreign country customer.

that "[n]o company under contract with the Saudi Arabian Government for the supply of arms or related equipment shall pay any amount of commission to any middleman, sales agent, representative or broker. . . ." Northrop refused thereafter to make the payments due to Triad under the Marketing Agreement, thus precipitating a dispute which the parties submitted to arbitration, resulting in the arbitration award in issue.

Paragraph 13 of the Marketing Agreement. Paragraph 13 of the Marketing Agreement provides in relevant part:

> The validity and construction of this Agreement shall be governed by the laws of the State of California in the United States of America. . . . Any controversy or claim between the parties hereto arising out of or in connection with this Agreement which might be the subject of any action at law or suit in equity shall be settled by arbitration in the City of Los Angeles, State of California, in the United States of America, under the rules then obtaining of the American Arbitration Association. The award of a majority of the arbitrators . . . shall be final and binding upon the parties, and judgment upon the award rendered may be entered in any court having jurisdiction.

Northrop proposed the inclusion of paragraph 13 in the Marketing Agreement because, as executive Manuel Gonzalez of Northrop testified in the arbitration proceeding, "we are familiar with the laws of California and would prefer . . . in the event of a dispute, to settle it in a forum which is more convenient [and because] it avoids a requirement on our part to go and in depth study [foreign] laws."

2. The Arbitration Proceeding[3]

Although the parties had expressly agreed that the validity and construction of the Agreement "shall be governed by the laws of the State of California," Northrop nevertheless contended that the arbitrators should apply Saudi Decree 1275, which Northrop argued precludes payment to Triad. Northrop asserted that (1) the parties' choice of law should be ignored and Saudi Decree 1275 applied and (2) even if California law were applied in the first instance, the enforceability of Triad's claims should be decided under Saudi Decree 1275 because that result is required by California Civil Code §1511 and

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[3]The arbitration, which was bifurcated, spanned a period of over four years. The parties filed with the Arbitrators 89 bound volumes of documents, briefs, memoranda, and supporting authorities (53 by Triad and 36 by Northrop) and other motions and memoranda. Thirty-eight witnesses testified in person, subject to cross-examination (16 called by Triad and 22 by Northrop). The Arbitration Tribunal held 45 days of hearings of evidence and oral arguments in Los Angeles, New York City, Las Vegas, Washington, D.C., and Frankfurt, Germany, which resulted in a reporter's transcript of 7,072 pages. The Tribunal issued three decisions, totalling 202 pages, on the merits of the various matters in dispute, in which the arbitrators weighed conflicting evidence, made factual determinations based thereon, and ruled on the parties' legal contentions. The three decisions included a number of rulings for and against each of the parties. On December 5, 1983, the arbitrators issued a final award, based on their earlier decisions, in favor of Triad and against Northrop, in the amount of $31,477,378.

The Arbitration Tribunal consisted of Chairman James A. Finch, former Chief Justice of the Supreme Court of Missouri, Telford Taylor, Professor of Law at Columbia University and Cardozo Law School and, initially, Michael V. DiSalle, a lawyer and former Governor of Ohio. Mr. DiSalle died in September 1981 and was replaced by George S. Ives, a lawyer and former member and sometimes chairman of the National Mediation Board.

California cases interpreting that statute. The arbitrators rejected both of Northrop's contentions. They held that paragraph 13 of the Marketing Agreement should be given effect by applying the local law of California to decide the rights and obligations of the parties. They also held that Civil Code § 1511 did not require a decision based on Saudi Decree 1275 because the Decree did not render performance by Northrop impossible, in that Northrop could still pay the commissions required by the Marketing Agreement and Triad could still give Northrop advice, translate documents, make local arrangements, and perform other services required by the Agreement. Applying California local law, the arbitrators held Triad was entitled to compensation for its services to the extent reflected in the arbitration award.

3. The Decision of the District Court

Triad sought confirmation of the arbitration award in the District Court below pursuant to § 9 of the Federal Arbitration Act, Appendix, page A-1. Northrop moved the District Court to vacate the award. The District Court gave effect to the parties' choice of law and applied the law of California to determine the enforceability of Triad's claims against Northrop. *Northrop Corp. v. Triad Financial Establishment*, 593 F.Supp. 928, 933, 936 (C.D. Cal. 1984). However, the court disagreed with the arbitrators' interpretation and application of California Civil Code § 1511 and California cases interpreting that statute. The court held, contrary to the decision of the arbitrators, that the California statute requires the application of Saudi Decree 1275 in determining the enforceability of Triad's claims. *See id.* at 936-37. The court also held that the Decree invalidates the Marketing Agreement and that the arbitration award should not be enforced on the ground of "public policy." *See id.* at 938-40.

The court vacated the award in substantial part, *see id.* at 942, and awarded Northrop a judgment in the amount of $253,004, based on the fact that Northrop had made overpayments in some earlier phases of the Peace Hawk Program.

4. The Decision of the Court of Appeals

The Court of Appeals reversed the judgment of the District Court because the lower court had failed to apply the rule of deferential review applicable to arbitration awards. The appellate court held that mere error by the arbitrators in the interpretation of California law would not be enough to justify refusal to enforce their decision — and that it was far from evident that the arbitrators had in fact misread California law. *Northrop Corp. v. Triad International Marketing S.A.*, 811 F.2d 1265, 1269-70 (9th Cir. 1987). Concerning the District Court's conclusion that the Saudi Decree prohibited payment of the commissions in issue, the Court of Appeals pointed out that the question before the arbitrators was whether payment was prohibited under California law, not Saudi law, and that "the answer to that question turned not upon whether Decree No. 1275 stated a rule of Saudi law under which the payment would be illegal, but rather upon whether the existence of such a rule in Saudi law excused performance under California Civil Code §1511." *See id.* at 1270.

The appellate court rejected Northrop's contention that enforcement of the arbitration award had properly been denied by the District Court on the ground of "public policy" because (1) California does not have a public policy that contracts unenforceable under the laws of any other jurisdiction will not be enforced in California, *see id.* at 1270; (2) the contention that the public policy of

Saudi Arabia should be applied "flies in the face of the parties' agreement that the law of California, and not Saudi Arabia, would determine the validity and construction of the contract," *see id.* at 1271; and (3) it is not clear whether the policy which the District Court found reflected in the Saudi Decree was also the policy of the U.S. Department of Defense[4], but even if it was, that policy was not "well defined and dominant," as it would have to be to justify refusal to enforce an arbitration award. *See id.* at 1271.[5]

SUMMARY OF ARGUMENT

The petition for certiorari should be denied because the question presented for review was not timely raised below. *See supra* p. 2.

Northorp's contention that an international contract governed by and valid under American law must be denied enforcement by an American court or arbitration tribunal merely because the contract is or may be unen-

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[4]DOD has not adopted a policy inconsistent with the payment of commissions to marketing representatives by FMS contractors. *See infra,* pp. 22-24.

[5]Northrop cites no case in which an arbitration award sought to be enforced pursuant to § 9 of the Federal Arbitration Act was denied enforcement on the ground of public policy. All of the cases cited by Northrop which held arbitration awards unenforceable on public policy grounds involved awards that were issued by lay arbitrators in labor arbitration proceedings. Petition at 9. Enforcement of the awards was sought pursuant to § 301 of the Labor Management Relations Act, 291 U.S.C. § 185 (1982). In each of these cases the award was found to conflict with a well-defined and dominant public policy expressed in a federal or state statute or, in one case, in a controlling decision of this Court. In three of the cases, there were dissenting opinions.

forceable under the law of a foreign country should not be adopted by this Court. The contention departs from long-established methods of adjudicating international conflict of laws cases, is wrong in principle, and is inconsistent with the public policy of the United States reflected in its adoption of the Convention on the Recognition and Enforcement of Arbitral Awards. Moreover, the contention should be rejected for application in this case because (1) Northrop is not required by the arbitration award to perform any act in Saudi Arabia, (2) the public policy allegedly reflected in the Saudi Decree is not well-defined and dominant, if it exists at all, (3) noncompliance with the Decree is not a criminal offense and there is no evidence that it is subject to any other Saudi penalty or sanction, (4) there is no evidence that enforcement of the award would affront the Government of Saudi Arabia or disturb the foreign relations of the United States with that country and (5) the cases relied upon by Northrop deal with unrelated matters and are therefore inapposite to the question presented for review. *See infra.* pp.11-20.

The petition should be denied because enforcement of the arbitration award is required by the strong public policy reflected in the Federal Arbitration Act in favor of the nonjudicial resolution of disputes by arbitration and the very limited judicial review of arbitration awards to that end. The Court of Appeals' reversal of the District Court judgment, based on that policy, was therefore correct. Subjecting arbitration awards to the type of judicial review proposed by Northrop would discourage both American and foreign businessmen from agreeing to arbitrate disputes arising out of international contracts and transactions. *See infra.* pp. 20-22.

The petition should be denied because the U.S. Department of Defense does not have a policy against the

payment of agent's fees by FMS contractors with Saudi Arabia (and Iran, Kuwait and Israel) as long as the cost thereof is not charged to the foreign country purchaser, which will not occur in this case. *See infra.* pp. 22-24.

ARGUMENT

I. An American Court Or Arbitration Tribunal Is Not Required To Decline To Enforce An International Contract Which Is Governed By And Valid Under American Law Merely Because The Contract Is Or May Be Unenforceable Under The Law Of A Foreign Country, At Least When The Obligation Sought To Be Enforced Is Not To Be Performed In The Foreign Country.

The operative language of Saudi Decree 1275 with respect to those commission agreements that were in effect when the Decree was promulgated in September 1975, is that "[a]ny commission arrangement already concluded . . . shall be considered void." The Decree does not include any criminal or civil penalty or other sanction for noncompliance therewith. There was substantial evidence in the arbitration proceeding that there is no Saudi law providing criminal penalties for failure to comply with a decree issued by the Saudi Arabian Council of Ministers. There was no evidence that there is any other Saudi penalty or sanction for such noncompliance. Nor was there evidence of any threatened Saudi reprisal if Northrop were to make the payments due to Triad under an arbitration award. Hence, the legal effect of the Saudi Decree as to marketing agreements in existence when the Decree was issued was simply to render them unenforceable in Saudi Arabia after September 1975.

Assuming, *arguendo*, that the Saudi Decree is applicable in this case[6], the consequence is that the Marketing Agreement is valid and enforceable under California law, as determined by the arbitrators and upheld by the Court of Appeals, and was rendered unenforceable in Saudi Arabia after September 1975. Thus, the first issue presented to the arbitrators for decision was the question which is raised whenever a contract is enforceable under the law of one interested jurisdiction and unenforceable under the law of the other, *i.e.*, which law shall be chosen to decide the rights and liabilities of the parties? In this case, paragraph 13 of the Marketing Agreement and controlling decisions of this Court[7] made it clear that the local law of California should be applied, and that is what the arbitrators did.

Northrop argues, in effect, that even though the arbitrators correctly concluded that the Marketing Agreement is governed by and valid under California law, they should nevertheless have permitted Northrop to escape liability thereunder because to enforce the contract might "affront" the Saudi Arabian Government. Petition at 10. This argument should be rejected, both in principle and because no such "affront" would in fact be involved.

1. Triad is not aware of any case (and Northrop has cited none) in which a federal (or other) court has initially chosen the law of a U.S. state to decide a case, found the plaintiff entitled to recover thereunder, and then denied recovery because a judgment for the plaintiff

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[6]There was substantial evidence that the only purpose of the Decree was to prohibit charging the cost of agents' fees to the Saudi Government, which will not occur in this case.

[7]*Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 516-20 (1974) and *M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1 (1972).

would be inconsistent with the public policy of a foreign country. Such a decision would depart from the decision of conflict of laws cases by American courts from time immemorial. Moreover, it would be wrong in principle.

Every rule of law — foreign or domestic, statutory or decisional — embodies or reflects a public policy respecting the subject with which it is concerned. Hence, where in an international conflict of laws case the substantive rules of an American state and a foreign country differ, an American court's choice of its own rule — and thus its policy — to decide a dispositive issue in the case necessarily produces a result which is inconsistent with the law and public policy of the foreign country involved. This has never heretofore been thought to require the American court to defer to the other country's policy at the expense of its own. If conflict of laws cases were so decided, it would mean that a forum court could never apply its own law and policy to decide a case where the other jurisdiction's law or policy was different. No court has ever adopted or writer advocated such a decisional methodology, in either domestic or international conflict of laws cases. Yet that is necessarily what Northrop contends should be done in this case.

2. A decision to vacate the arbitration award on the basis of Saudi public policy would also be wrong because that policy is not "well defined and dominant," as required by this Court's decision in *W.R. Grace and Co. v. Local Union 759*, 461 U.S. 757, 766 (1983). The Saudi Decree is not a statement of fundamental Saudi law, but essentially a procurement regulation, the application of which to this case is at least uncertain, as concluded by

the Court of Appeals[8]. Accordingly, the Saudi Decree should not have been given dispositive weight by the arbitrators or the courts below for the same reasons that the Court of Appeals declined to give such weight to the law of Kuwait in *Alghanim v. Boeing Co.*, 477 F.2d 143 (9th Cir. 1973).

3. The fundamental public policy of the United States regarding the enforcement of arbitration awards arising out of international contracts and transactions is reflected in this country's adoption in 1970 of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 9 U.S.C. §201, *et seq.*, ("the Convention"), Appendix, p. A-3. The nations adopting the Convention thereby agreed that "[e]ach Contracting State *shall recognize* arbitral awards as binding and enforce them," unless "the competent authority in the country *where recognition and enforcement is sought* finds that . . . recognition or enforcement of the award would be contrary to the public policy *of that country.*" (Articles III, V). (emphasis added). The Convention does *not* provide,

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[8]Northrop contends that the Court of Appeals did not disturb the District Court's "findings" that the Saudi Decree "imposed a flat ban on payment of commissions to agents like Triad and that the Decree was formulated specifically with the Northrop-Triad agency relationship in mind." Petition at 7. Of course, the District Court's rulings on these issues were not findings of fact, but reflected the court's interpretation of the Saudi Decree. The rulings were therefore decisions on questions of law that were before the Court of Appeals for *de novo* review. Nor did that court simply accept them. The Court of Appeals noted and implicitly affirmed the arbitrators' determination that "in this case despite the issuance of Decree No. 1275, Northrop could still pay Triad the commissions the Marketing Agreement called for, and Triad could still give advice, translate documents, make local arrangements, and perform the other services the agreement required," *see* 811 F.2d at 1268, — an interpretation of the Saudi Decree clearly at variance with that of the District Court.

however, that enforcement of a foreign arbitral award may be refused if such enforcement would be contrary to the public policy of *any other* foreign country. Thus, if the present dispute had been arbitrated by agreement in England or France instead of California, if the same award had been issued, and if enforcement of that award had been sought in the District Court pursuant to the Convention, enforcement could not have been denied on the ground that it might "affront" Saudi Arabia.

The nations adopting the Convention were doubtless aware that arbitration awards respecting international contracts are likely to be inconsistent with the laws or policies of one of the countries involved in the underlying transaction — but also aware that to make such inconsistency a basis for nonenforcement would severely impair the very purpose of the Convention, which is to promote the nonjudicial resolution of such disputes.[9] In *not* making inconsistency with foreign law a basis for refusal to enforce arbitration awards, the Convention signatories implicitly recognized that the occasions are few, if any, when judicial enforcement of an arbitrator's decision of a private commercial dispute is likely to be regarded as an "affront" by a foreign country, much less one likely to disturb the "delicate area of foreign affairs" Petition at 1, 14.

4. There is no reason to believe that enforcement of the arbitration award would in fact "affront" the Saudi Arabian Government. The Saudi Government has not asserted any position in this dispute. Moreover, the record strongly indicates that the Saudis are not concerned

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[9]*Rhone Mediterranee Co. v. Lauro*, 712 F.2d 50, 53-54 (3d Cir. 1983); *Bergesen v. Joseph Muller Corp.*, 710 F.2d 928, 933-34 (2d Cir. 1983); *Parsons & Whittemore Overseas Co. v. Societe Generale*, 508 F.2d 969, 974 (2d Cir. 1974).

with whether payments are made to marketing representatives, but only with whether the cost thereof is charged to the Saudi Government. Indeed, Samir Shamma, Triad's expert witness on Saudi law, testified in the arbitration proceeding that the Decree itself should be so interpreted. Moreover two senior *Northrop* officials testified before the arbitrators that Prince Sultan, head of the Saudi Arabian Ministry of Defense and Aviation, told one of them in 1971 and the other in 1975 that he had nothing against agents as such but if Northrop wanted to have agents, it should pay for them itself and not charge the Saudi Government. By reason of action taken by DOD in July 1975, *see infra* pp. 23-24, Triad's commissions were not included in the charges made by DOD to the Saudi Arabian Government after that date. *A fortiori*, Northrop's payment of a judgment in favor of Triad will not be charged to Saudi Arabia.

5. To support its new contention Northrop relies principally upon *In re Chase Manhattan Bank*, 297 F.2d 611 (2d Cir. 1962); *Trade Development Bank v. Continental Insurance Co.*, 469 F.2d 35 (2d Cir. 1972); *United States v. First National City Bank*, 396 F.2d 897 (2d Cir. 1968); and *United States v. Ross*, 302 F.2d 831 (2d Cir. 1962).[10]

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[10]Northrop also cites *Underhill v. Hernandez*, 168 U.S. 250, 252 (1897) and *Mannington Mills, Inc. v. Congoleum Corp.*, 595 F.2d 1287 (3d Cir. 1979). *Underhill* held, under the act of state doctrine, that the head of a foreign country could not be held liable in an American court for an act committed in that country. In *Mannington* the court (1) held that the act of state doctrine did not require deference to patents issued in foreign countries and (2) remanded the case for determination whether the exercise of extraterritorial jurisdiction under the U.S. antitrust laws with respect to patent application activities of the defendant in foreign countries was warranted on the facts of the case.

These cases are inapposite to the issue which Northrop seeks to raise.

A. The cases were not concerned with the question whether an international contract which is governed by and valid under American law must be denied enforcement merely because the contract is or may be unenforceable under the law of a foreign country. They involved, instead, the entirely different question of whether and when documents and information in a foreign country ("foreign evidence") must be produced in the course of an investigative or discovery proceeding in an American court, against the objection that production would violate the law of the foreign country. The answers to the questions have markedly different consequences. The answer to the first question determines finally the substantive rights and obligations of the parties. The answer to the second question concerns only matters of procedure and evidence, the effect of which on the outcome of any case is conjectural at best. Accordingly, the considerations favoring the application of American law in the choice of law cases are much stronger than those applicable in the foreign evidence cases.

B. Determining whether and when foreign evidence must be produced in an American court proceeding, against the contention that such production would violate the law of the foreign country, has proved to be a vexing problem, on aspects of which this Court has spoken at

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Neither *Underhill* nor *Mannington* has any application here. The act of state doctrine does not apply in this case because Triad does not challenge the validity of the Saudi Decree in Saudi Arabia; indeed, its very validity there required the choice of law made by the arbitrators pursuant to paragraph 13 of the Marketing Agreement. Nor is the exercise of extraterritorial jurisdiction under American law involved in this case, because enforcement of the arbitration award will not require any act by Northrop in Saudi Arabia.

least twice[11]. *Societe Nationale v. U.S. District Court*, 107 S.Ct. 2542 (1987); *Societe Internationale v. Rogers*, 357 U.S. 197 (1958). The lower federal courts have in some cases resolved that question by excusing such production. They have in other cases required production to be made, either because they were unpersuaded of the alleged violation of foreign country law or because they determined that production was justified in the circumstances of particular cases, even if inconsistent with foreign country law[12]. The varying results reached in these cases dealing with the production of foreign evidence hardly yield a principle suitable for resolution of the wholly different question that Northrop seeks belatedly to raise in this case.

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[11]Contrary to Northrop's assertion, petition at 14, *et seq.*, there is no conflict between the decisions of the Ninth Circuit and the Second Circuit or any other circuit respecting the considerations which are relevant in deciding foreign evidence cases. *United States v. Vetco, Inc.*, 644 F.2d 1324, 1330-33 (9th Cir. 1981), *amended*, 691 F.2d 1281, *cert. denied* 454 U.S. 1098 (1981) (IRS summons enforced despite possible criminal liability under Swiss secrecy laws, after court considered same factors as held to be relevant by other courts of appeals).

[12]*In re Grand Jury Proceedings Bank of Nova Scotia*, 740 F.2d 817 (11th Cir. 1984); *United States v. Vetco, Inc.*, 644 F.2d 1324 (9th Cir. 1981), *amended*, 691 F.2d 1281, *cert. denied*, 454 U. S. 1098 (1981); *In re Grand Jury Proceedings*, 532 F.2d 404 (5th Cir. 1976); *Arthur Andersen & Co. v. Finesilver*, 546 F.2d 338 (10th Cir. 1976), *cert. denied subnom., Arthur Andersen & Co. v. Ohio*, 429 U.S. 1096 (1977); *United States v. First National City Bank*, 396 F.2d 897 (2d Cir. 1968); *United States v. Chase Manhattan Bank, N.A.*, 584 F.Supp. 1080 (S.D.N.Y. 1984); *Garpeg, Ltd. v. United States*, 583 F.Supp. 789 (S.D.N.Y. 1984); *In re Grand Jury 81-2*, 550 F.Supp. 24 (W.D. Mich. 1982); *In re Uranium Antitrust Litigation*, 480 F.Supp. 1138 (N.D. Ill. 1979).

C. In the only cases cited by Northrop wherein litigants were not required to produce foreign evidence it was because the American courts were persuaded that such production would require conduct in foreign countries violative of their criminal laws. *In re Chase Manhattan Bank,* 297 F.2d 611, 613 (2d Cir. 1962); *Trade Development Bank v. Continental Insurance Company*, 469 F.2d 35, 40 (2d Cir. 1972); *United States v. Ross*, 302 F.2d 831, 834 (2d Cir. 1962). Those cases are not applicable here because

— whether payment to Triad would violate the Saudi decree is at least doubtful, *see supra* pp. 15-16,

— payment to Triad will not require Northrop to perform any act in Saudi Arabia,

— payment to Triad would not violate any criminal law in Saudi Arabia,

— there is no evidence that payment to Triad would incur any other Saudi penalty or sanction, and

— there is no evidence that the Saudi government would in fact be offended by a payment to Triad made pursuant to a judgment of an American court confirming an arbitration award issued after a lengthy arbitration proceeding.

D. In the cases relied upon by Northrop, the contention that production of foreign evidence should not be required was raised in the trial court at the outset of the proceeding, where evidence bearing on the issue could be produced and considered. In this case the issue now sought to be presented by Northrop was not raised either before the arbitrators or in the District Court and was not timely raised in the Court of Appeals. Northrop should not be permitted to raise the issue now, more than

eight years after the arbitration proceeding was commenced.

II. The Public Policy Dispositive Of Northrop's Petition Is That Arbitration Awards For Which Parties Have Bargained Are Required To Be Enforced By Federal Courts.

The decision of the Court of Appeals was correct because it gave effect to the strong public policy, reflected in the Federal Arbitration Act, that nonjudicial resolution of disputes through arbitration is highly desirable and is to be given support by federal courts at every stage of an arbitration proceeding.

1. Northrop proposed that paragraph 13 be included in the Marketing Agreement to make sure that any dispute between the parties *would be decided under California law as interpreted and applied in an arbitration proceeding conducted in Los Angeles, California.* In the arbitration award which was issued on December 5, 1983, Northrop got exactly what it had bargained for. Yet, for almost four years since Northrop has sought desperately to avoid that result. Northrop's effort must be rejected if the policies and objectives of the Federal Arbitration Act are to be achieved in this case.

2. The temptation of a party who loses in arbitration to attempt to retry the case in the federal courts is understandable. But such retrial is clearly precluded by § 9 of the Federal Arbitration Act, Appendix, p. A-1, which provides that an order enforcing an arbitration award "*must*" be granted unless that award is vacated on a ground set forth in § 10 of the Act, Appendix, p. A-2. None of those grounds is applicable in this case.

3. Northrop received a lengthy and fair hearing by an eminently qualified arbitration tribunal, in the course of

which Northrop was given the opportunity to present every ground upon which it might wish to contend that the Marketing Agreement should not be enforced. Northrop contracted to accept and abide by the arbitrators' decision. Yet, Northrop now petitions this Court to order nonenforcement of the arbitration award on the basis of an argument that was never made and of cases that were never cited to the arbitrators — or to the courts below for that matter, prior to their tardy inclusion in Northrop's petition for rehearing in the Court of Appeals. To permit Northrop thus to engage in a series of seriatim, piecemeal attacks on the arbitration award would make a mockery of the Federal Arbitration Act and its public policy of promoting this nonjudicial method of dispute resolution.

4. The Court of Appeals was clearly right in reversing the District Court because of its failure to accord deference to the arbitrators' interpretation of California Civil Code §1511 and the California decisions upon which the arbitrators relied. Arbitrators decisions on questions of law are not subject to *de novo* review by federal courts. *George Day Construction Co. v. United Brotherhood of Carpenters*, 722 F.2d 1471, 1476-77 (9th Cir. 1984); *Andros Compania Martima S.A. v. Marc Rich & Co., A.G.*, 579 F.2d 691 (2d Cir. 1978); *MSP Collaborative Developers v. Fidelity and Deposit Co. of Maryland*, 596 F.2d 247 (7th Cir. 1979); *Marion Manufacturing Co. v. W.B. Long*, 588 F.2d 538, 541, n.3 (6th Cir. 1978).[13]

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[13]In *Wilko v. Swan*, 346 U.S. 427, 436-37 (1953), this Court suggested that an arbitrator's interpretation of law might be reviewable if he acted in "manifest disregard" of the law. Northrop has not contended nor did either court below hold that the arbitrators in this case acted in manifest disregard of the law. The record makes clear that they did not.

Northrop contends that unless the federal courts review arbitration awards to determine whether they "intrude on U. S. foreign policy interests" the willingness of domestic and foreign parties to commit to arbitration will be undercut. Petition at 17. The truth is, of course, exactly the opposite: the willingness of American and foreign businessmen to agree to arbitrate disputes arising under international contracts and transactions will quite obviously be inversely proportional to the risk that such awards could be denied enforcement by American courts on any ground, and particularly a ground as amorphous as whether enforcement will intrude on U.S. foreign policy interests.

III. The U.S. Department Of Defense Does Not Have A Policy Against The Payment Of Commissions To Marketing Representatives By FMS Contractors But Only Against The Charging Of Those Payments To Saudi Arabia, Which Will Not Occur In This Case.

Northrop repeatedly states or implies that the U.S. Department of Defense ("DOD") has forbidden payment of commissions to marketing representatives by FMS contractors and that this alleged DOD action constitutes the public policy of the Executive Branch of the Federal Government on that subject.[14] Petition at 3-4, 6, 10, 15. Northrop's contention is unfounded, both because the DOD procurement regulation on which Northrop's contention is based hardly constitutes a "well-defined and dominant" public policy of the Executive Branch and

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[14]Triad does not believe that this issue is included in the "question for decision" presented by Northrop's petition and addresses it only out of an abundance of caution.

because the DOD regulation did not in fact prohibit such payments.[15]

A revised Defense Acquisition Circular, issued by DOD in July 1975 and applicable to Saudi Arabia, Iran, Kuwait and Israel, is set forth at page A-7 of the Appendix. As is self-evident on the face of the Circular, the *only* concern of DOD with payments made by an FMS contractor to a marketing representative, in the case of Saudi Arabia (and Iran, Kuwait and Israel), is that such payments not be claimed by the contractor as an allowable item of cost under its contract with DOD, in which event they would be included in DOD's charges to the contracting foreign country. The policy expressed in the Circular was contemporaneously interpreted *not* to preclude payments to agents if they were not charged to the foreign governments. A DOD Assistant Counsel for International Affairs issued an opinion in 1976 which stated that a contractor may pay commissions "out of its general profits or other assets available to it". A Northrop official opined in 1974, with respect to the original Circular which

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[15]Northrop contends that the Court of Appeals did not disturb the District Court's "finding" that DOD required Northrop to comply with the Saudi Decree. Petition at 7, 14. The District Court's ruling on this issue was a decision on a question of law that was before the Court of Appeals for *de novo* review. The Court of Appeals disagreed with the District Court's determination that DOD required Northrop to comply with the Saudi Decree, holding that "[i]t is not clear from the evidence before the arbitrators and the District Court what policy the Department of Defense adopted." The Court of Appeals noted, without rejecting, Triad's argument that "both Decree No. 1275 and the Department of Defense policy were aimed at prohibiting commissions that added to the cost of Saudi procurement, and that in any event the Department of Defense was unable to determine the Decree's exact application, even assuming the Department of Defense wished to mirror its policy." *Triad Intern. Marketing S.A.*, 811 F.2d at 1271.

was applicable only to Iran, that "commissions are acceptable if paid from profit."

The District Court misinterpreted the July 1975 Defense Acquisition Circular, supposing that it precludes payment of agents' fees. But, as its language makes clear, Appendix pp. A-7-8, the Circular only requires *a certification that the FMS contractor is not seeking reimbursement for such payments, to be charged ultimately to Saudi Arabia (or Iran, Kuwait or Israel)*. That was, indeed. the specific certification required of Northrop by DOD in the Letters of Offer sent to the Saudi Arabian Ministry of Defense in the Peace Hawk Program.[16] That DOD policy is wholly irrelevant to this case because there is no contention that Saudi Arabia will be asked to reimburse Northrop for monies paid in satisfaction of the arbitration award or a judgment based thereon.

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[16]The Phase III E Letter of Offer originally contained the standard clause set forth in the revised Defense Circular. In July 1975, *Northrop* proposed and DOD agreed that the Letter of Offer be changed to require assurances by Northrop that no agent's fees would be paid in Phase III E. When this contributed to an impasse between Northrop and Triad that threatened to jeopardize Phase III E and the Peace Hawk Program, *DOD* proposed that a new Letter of Offer be prepared, providing that any agents fees "are the sole responsibility of Northrop and will not in any manner be passed through to the [the Saudi Arabian Government]." Northrop thereupon proposed *and DOD agreed* to restore the original certification language to the Phase III E Letter of Offer. Because the impasse was otherwise resolved, that change was not made. All of DOD's Letters of Offer for later phases of the Peace Hawk Program required only the standard certification, that Northrop would not claim compensation paid to a marketing agent as an allowable item of cost and would not include it in the contract price. *Triad Financial Establishment*, 593 F. Supp. at 933.

CONCLUSION

Triad respectfully submits that Northrop's petition for writ of certiorari should be denied for the reasons discussed above.

DATED: September 28, 1987

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APPENDIX OF STATUTES AND REGULATIONS

APPENDIX

UNITED STATES CODE

TITLE 9

ARBITRATION

CHAPTER 1 — GENERAL PROVISIONS

* * *

§2. Validity, irrevocability, and enforcement of agreements to arbitrate

A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

July 30, 1947, c. 392, 61 Stat. 670.

* * *

§9. Award of arbitrators; confirmation; jurisdiction; procedure

If the parties in their agreement have agreed that a judgment of the court shall be entered upon the award made pursuant to the arbitration, and shall specify the court, then at any time within one year after the award is made any party to the arbitration may apply to the court so specified for an order confirming the award, and thereupon the court must grant such an order unless the award is vacated, modified, or corrected as prescribed in

sections 10 and 11 of this title. If no court is specified in the agreement of the parties, then such application may be made to the United States court in and for the district within which such award was made. Notice of the application shall be served upon the adverse party, and thereupon the court shall have jurisdiction of such party as though he had appeared generally in the proceeding. If the adverse party is a resident of the district within which the award was made, such service shall be made upon the adverse party or his attorney as prescribed by law for service of notice of motion in an action in the same court. If the adverse party shall be a non-resident, then the notice of the application shall be served by the marshal of any district within which the adverse party may be found in like manner as other process of the court.
July 30, 1947, c. 392, 61 Stat. 672.

§10. Same; vacation; grounds; rehearing

In either of the following cases the United States court in and for the district wherein the award was made may make an order vacating the award upon the application of any party to the arbitration —

(a) Where the award was procured by corruption, fraud, or undue means.

(b) Where there was evident partiality or corruption in the arbitrators, or either of them.

(c) Where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced.

(d) Where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and defi-

nite award upon the subject matter submitted was not made.

(e) Where an award is vacated and the time within which the agreement required the award to be made has not expired the court may, in its discretion, direct a rehearing by the arbitrators.

July 30, 1947, c. 392, 61 Stat. 672.

CHAPTER 2 — CONVENTION ON THE RECOGNITION AND ENFORCEMENT OF FOREIGN ARBITRAL AWARDS.

§ 201. Enforcement of Convention

The Convention on the Recognition and Enforcement of Foreign Arbitral Awards of June 10, 1958, shall be enforced in United States courts in accordance with this chapter.

(Added Pub.L. 91-368, § 1, July 31, 1970, 84 Stat. 692.)

Convention on the Recognition and Enforcement of Foreign Arbitral Awards

Article I

1. This Convention shall apply to the recognition and enforcement of arbitral awards made in the territory of a State other than the State where the recognition and enforcement of such awards are sought, and arising out of differences between persons, whether physical or legal. It shall also apply to arbitral awards not considered as domestic awards in the State where their recognition and enforcement are sought.

2. The term "arbitral awards" shall include not only awards made by arbitrators appointed for each case but

also those made by permanent arbitral bodies to which the parties have submitted.

3. When signing, ratifying or acceding to this Convention, or notifying extension under article X hereof, any State may on the basis of reciprocity declare that it will apply the Convention to the recognition and enforcement of awards made only in the territory of another Contracting State. It may also declare that it will apply the Convention only to differences arising out of legal relationships, whether contractual or not, which are considered as commercial under the national law of the State making such declaration.

Article II

1. Each Contracting State shall recognize an agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration.

2. The term "agreement in writing" shall include an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams.

3. The court of a Contracting State, when seized of an action in a matter in respect of which the parties have made an agreement within the meaning of this article, shall, at the request of one of the parties, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed.

Article III

Each Contracting State shall recognize arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory where the award is relied upon, under the conditions laid down in the following articles. There shall not be imposed substantially more onerous conditions or higher fees or charges on the recognition or enforcement of arbitral awards to which this Convention applies than are imposed on the recognition or enforcement of domestic arbitral awards.

Article IV

1. To obtain the recognition and enforcement mentioned in the preceding article, the party applying for recognition and enforcement shall, at the time of the application, supply:

(a) The duly authenticated original award or a duly certified copy thereof;

(b) The original agreement referred to in article II or a duly certified copy thereof.

2. If the said award or agreement is not made in an official language of the country in which the award is relied upon, the party applying for recognition and enforcement of the award shall produce a translation of these documents into such language. The translation shall be certified by an official or sworn translator or by a diplomatic or consular agent.

Article V

1. Recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent

authority where the recognition and enforcement is sought, proof that:

(a) The parties to the agreement referred to in article II were, under the law applicable to them, under some incapacity, or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made; or

(b) The party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case; or

(c) The award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contain decisions on matters submitted to arbitration may be recognized and enforced; or

(d) The composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place; or

(e) The award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made.

2. Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that:

(a) The subject matter of the difference is not capable of settlement by arbitration under the law of that county; or

(b) The recognition or enforcement of the award would be contrary to the public policy of that country.

UNITED STATES DEPARTMENT
OF DEFENSE

DEFENSE ACQUISITION CIRCULAR

Department of the Air Force
Headquarters United States Air Force
Washington, D.C.

1 Jul 1975

Reply to
Attn of: LGPC

Subject: Agent's Fees/Commissions for Foreign Military Sales

To: ALMAJCOM/PROCUREMENT

1. The following provision to be published in a forthcoming DPC is effective immediately and supersedes Item X of DPC 74-1:

a. One of the following provisions shall be included in all contracts for FMS requirements of the Governments of Iran, Israel, Kuwait and Saudi Arabia unless the agent's fee/commission has been identified and payment thereof approved by the respective Governments before contract award:

(1) For firm fixed price contracts or fixed price contracts with escalation:

"The Contractor certifies that the contract price does not include any direct or indirect cost of agent's fees/commission for contractor sales agents involved in Foreign Military Sales to the Government of _____."

(2) All other types of contracts:

"Notwithstanding any other provision of this contract, any direct or indirect costs of agent's fees/commissions for contractor sales agents involved in Foreign Military Sales to the Government of _____ shall be considered as an unallowable item of cost under this contract."

2. For all FMS cases involving countries other than those named in 1. above, the policies set forth in Item IX of DPC 74-1 are modified as follows: Whereas DPC 74-1 presently requires the contracting officer to obtain a "Contractor's Statement of Contingent or Other Fees" (SF 119) and make the ASPR 1-505 determination of a bona fide agency relationship and the "reasonableness" of the fee at the time the contract is negotiated, the new policy will require these actions prior to the submission of the Letter of Offer to a foreign government. If the reasonableness of potential Agent's Fees/Commissions for proposed Foreign Military Sales Programs cannot be determined, such charges will be identified in writing by the most appropriate means, to officials of the foreign government prior to or in consonance with the presentation of the Letter of Offer for the proposed sale. The acceptance of the Letter of Offer involved, after appropriate presentation of the statement of Agent's Fees, will be construed by the Department of Defense as the foreign government's approval of the Agent's Fees/Commissions involved.

3. All correspondence with foreign governments concerning Agent's Fees/Commissions will be forwarded to the foreign country by Departmental Headquarters with DSAA coordination.

BERTON J. ROTH
Deputy Assistant for ASPR
Directorate, Procurement
Policy

PROOF OF SERVICE BY MAIL

I am a citizen of the United States and a resident of the City and County of Los Angeles; I am over the age of eighteen years and not a party to the within action; my business address is: 1706 Maple Avenue, Los Angeles, California.

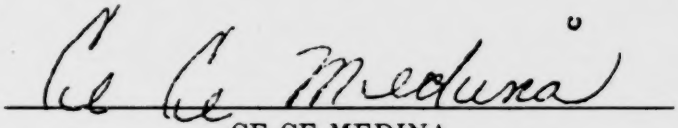
On September 28, 1987, I served the within Opposition to Petition for a Writ of Certiorari in re: "Northrop Corporation vs Triad International Marketing, S.A." in the United States Supreme Court, October Term 1987, No.87-349; on the Parties in said action, by placing Three copies thereof enclosed in a sealed envelope with postage fully prepaid, in the United States post office mail box at Los Angeles, California, addressed as follows:

Ronald L. Olson
Munger, Tolles, & Olson
355 South Grand Avenue 35th Floor
Los Angeles, California 90071-1560

All parties required to be served have been served.

I certify (or declare), under penalty of perjury, that the foregoing is true and correct.

Executed on September 28, 1987, at Los Angeles, California



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